

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**
[ISSN 2581-5369]

Volume 3 | Issue 3

2020

© 2020 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at editor.ijlmh@gmail.com.

Addition of New War Crimes in the ICC Statute – A critical analysis

PRATYUSHA KAR¹

ABSTRACT

Sixteenth Assembly of State Parties (ASP) to the Rome Statute of the International Criminal Court (ICC) adopted three amendments to the Article 8 of the Statute by adding three war crimes namely the use of biological weapons, the use of weapons injuring by non-detectable fragments and the use of laser weapons causing permanent blindness. The present study critically examines the judiciousness and legitimacy of the inclusion of these three new crimes in the war crimes list mainly on two counts – the question of fragmentation of the ICC jurisdiction due to new weapons amendments and obligations to include only those crimes which are under customary international law in the ICC Statute. Subsequent analysis of the fragmentation issue, however, revealed that Office of the Prosecutor (OTP) has the independence to frame charge against any non-State Party who has committed new war crimes on the State Party. Reaffirmation of the judicial independence as included in paragraph 3 of the ASP Resolution ‘ICC-ASP/16/Res.5’ also advocates non-fragmentation of the ICC jurisdiction. Apropos of exploration of the jurisdiction of the Court beyond customary international law through inclusion of new war crimes, this study proclaims that the Court has every right to administer jurisdictional interpretation based on criminalization of conduct and to consider superiority of the ‘internationally recognized human rights’ if there is a norm conflict between the non-retroactive principle and the comprehensive statutory norms.

I. INTRODUCTION

Biological agents are having the potentiality to more rapidly disseminate and to ensure more destruction than chemical or nuclear weapons.² It is evident that at least four nations, Japan, US, Iraq and USSR have weaponised pathogens and today’s Russian Federation still continues with the legacy of earlier biological warfare programme.³ Apart from those four, at

¹ Author is a student at West Bengal National University of Juridical Sciences, Kolkata, India.

² Eitzen E, Takafuji E, “Historical Overview of Biological Warfare”, in Medical Aspects of Chemical and Biological Warfare, Chapter 18, Page – 417, Office of the Surgeon General, Department of the Army, United States of America. Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.360.3421&rep=rep1&type=pdf>.

³ Zilinskas R A, “A brief history of biological weapons programmes and the use of animal pathogens as biological warfare agents”, 36(2) Rev. Sci. Tech. Off. Int. Epiz., 2017, 415-422.

least thirteen more nations are suspected of having biological weapons programme namely Canada, China, Cuba, France, Germany, Iran, Israel, Libya, North Korea, South Africa, Syria, the United Kingdom and Taiwan.⁴In a recent post in the Forbes, it has been observed that “the threat of biological warfare is increasing” and the disease proliferating deadly pathogens can be easily propagated in the laboratories.⁵The US Department of Defense funded present project ‘Insect Allies Programme’ aiming to proliferate virus-transmitting insects to infest crops and thereby modifying their genome could be very well misused as a biological weapon.⁶

Additionally, injury caused by the non-detectable fragments like glass, plastic etc. is difficult to treat for their non-detectability.⁷The prohibition of the use of non-detectable fragments as a weapon “is an expression of the principle that the purpose of a weapon should not be to hinder the healing of wounds it causes, and this principle is certainly one of the basic elements for determining whether a weapon produces ‘unnecessary suffering’”.⁸ Accordingly, in the Convention on Certain Conventional Weapons (CCW) in 1980, Protocol on Non-Detectable Fragments was adopted. The said protocol, however, came into force since 2 December 1983.⁹ Furthermore, presently “the world is moving closer to laser weapons in both military and law enforcement situations that can cause temporary and even permanent blindness”.¹⁰The UN’s 1995 Protocol on Blinding Laser Weapons¹¹ has its limitations. Although the protocol bans its use against human, it could be used for range finding, target illumination and crippling target sensor.¹² In turn, it has the potentiality to use against human beings¹³ besides its proposed use.

4NTI, “Germs Don’t Respect Borders, so Biological Threats—Manmade and Naturally Occurring—can Quickly have Global Impacts”, NTI, December 30, 2015. Available at <https://www.nti.org/learn/biological/>

5Thompson L, “The Threat Of Biological Warfare Is Increasing, And The U.S. Isn’t Ready”, Forbes, April 9, 2018. available at <https://www.forbes.com/sites/lorenthompson/2018/04/09/biowar-a-guide-to-the-coming-plague-years/#23961d6e5fe5>.

6Reeves R G, Voeneky S, Caetano-Anollés D, Beck F and Boëte C, “**Agricultural research, or a new bioweapon system?**”, **362(6410) Science**, 2018, 35.

7Boothby W H, “Weapons and the Law of Armed Conflict”, Oxford University Press, 2016, 190.

8Sandoz y, “A New Step Forward in International Law: Prohibitions or Restrictions on the Use of Certain Conventional Weapons”, INT’L REV. OF THE RED CROSS, Jan.-Feb. 1981, at 3, 11.

9Protocol on Non-Detectable Fragments (Protocol I), Geneva, 10 October 1980. Available at http://www.weaponslaw.org/assets/downloads/1980_Protocol_I.pdf

10Samzenpus, “How Governments Are Getting Around the UN’s Ban On Blinding Laser Weapons”, Slashdot, September 15, 2014. Available at <https://tech.slashdot.org/story/14/09/15/1545232/how-governments-are-getting-around-the-uns-ban-on-blinding-laser-weapons>.

11Protocol on Blinding Laser Weapons (Protocol IV), Vienna, 13 October 1995. Available at http://www.weaponslaw.org/assets/downloads/1995_CCW_Prot_IV.pdf.

12Marshall, John, “Blinding Laser Weapons: Still Available on the Battlefield”, 315:7120 British Medical Journal, 1997, 1392.

13*ibid.*

Thus, these weapons aimlessly murder people or cause superfluous injuries or induce awfully grievous suffering.

Consequently, in December 2017, the Assembly of State Parties (ASP) to the Rome Statute of the International Criminal Court (ICC) in its sixteenth session amended Article 8 of the Statute and appended three new war crimes which include use of “microbial or other biological agents, or toxins”;¹⁴ use of “weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays”¹⁵ and the use of “laser weapons ... to cause permanent blindness”.¹⁶ Recognition of the use of these weapons in warfare as a war crime and their inclusion in the Rome Statute shall not only block their use in aggression but also provide the legal surety of the ordeals, the victims have encountered. This would strengthen the process of peace preservation and prohibition of grievous war crimes of international concern.

But there is a debate over the judiciousness and legitimacy of the inclusion of these three new crimes in the war crimes list mainly because of two considerations – (i) this may lead to fragmentation of the ICC jurisdiction since under diverge circumstances crimes are incongruously applicable to different persons and (ii) some states have observed that these new crimes are not outlawed under Customary International Law and, therefore, are not suited to be included as war crimes under ICC Statute.

In the vein of the foregoing preludes in view, the issue of addition of new war crimes in the ICC Statute has been critically analyzed in the present research study. Subsequent to introduction, part II of the research work presents the scope of the present study, part III proposes the hypotheses, part IV submits the research questions, part V reflects the research methodology, part VI focuses on new war crimes amendments and fragmentation of the court’s jurisdiction, part VII explicates Customary International Law (CIL) and obligation, if any, to include only the crimes under CIL in the ICC Statute, part VIII elucidates the problems of inclusion of crimes not under CIL in the ICC Statute and part IX is the concluding part, inclined to sum up entire findings with a number of categorical comprehensive observations.

14 Rome Statute of the International Criminal Court, Article 8, ¶ 2(e) (xiii), 1998, available at <https://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf>.

15 Rome Statute of the International Criminal Court, Article 8, ¶ 2(e) (xiv), 1998, available at <https://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf>.

16 Rome Statute of the International Criminal Court, Article 8, ¶ 2(e) (xv), 1998, available at <https://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf>.

II. SCOPE

Under the perspectives of fragmentation of Rome Statute and Customary International Law, the present study critically analyses adoption of three amendments of the Article 8 of the Rome Statute restricting the use of three kinds of weapons namely weapons which use biological agents, weapons which use non-detectable fragments and the laser weapons which cause permanent blindness in the armed conflict. However, the present study does not consider other crimes like ‘anti-personnel mines’ within the scope of research.

III. HYPOTHESES

1. New war crimes amendments do not fragment the court’s jurisdiction.
2. It is not obligatory to include only those crimes which are under CIL in the ICC Statute.

IV. RESEARCH QUESTIONS

1. Whether the war crimes amendments fragment the court’s jurisdiction?
2. Is it obligatory to include only the crimes under CIL in the ICC Statute?
3. What are the problems of inclusion of those crimes which are not under CIL?

V. RESEARCH METHODOLOGY

The methodology adopted is that of basic and descriptive research method on the issue at hand, namely, ‘addition of new war crimes in the ICC Statute – a critical analysis’ using primary data from the statutes, case laws, regulations etc. and secondary data collected from the blogs, books, policy papers, reports etc.

VI. NEW WAR CRIMES AMENDMENTS AND FRAGMENTATION OF THE COURT’S JURISDICTION

Conforming to Article 121(5) of the Rome Statute, the adoption of three amendments of the Article 8 by the Assembly of State Parties (ASP) is only applicable for State parties for the International Armed Conflict (IAC) as well as Non-International Armed Conflict (NIAC).¹⁷The second sentence of Article 121(5), however, raised a number of controversies pertaining to crime of aggression where it states that –

“[i]n respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the

¹⁷Heller K J, “Why the New Weapons Amendments (Should) Apply to Non-States Parties”, *OpinioJuris*, January 2, 2018. Available at <http://opiniojuris.org/2018/01/02/the-bizarre-and-ineffective-preamble-to-the-weapons-amendments/>.

amendment when committed by that State Party's nationals or on its territory."

According to "Article 121(5) Model with a Negative Understanding" the second sentence of Article 121(5) inhibits the court from implementing its jurisdiction in the event of a crime of aggression when either the offending State Party or the victim State Party has not accepted the crime of aggression provisions.¹⁸ Thus, only a literal meaning of the second sentence of Article 121(5) would be considered.¹⁹

On the other hand, pursuant to the 'Article 121(5) Model with a Positive Understanding', the second sentence of Article 121(5) of the ICC Statute would only place State Parties who have not agreed upon with the amendments exactly on the equal footing with as that of the non-State Parties. Consequently, the jurisdiction is conceivably recognized in spite of the fact that one of the State Party has not endorsed the amendments.²⁰

Nonetheless, in case of most serious crimes of concern namely 'the crime of genocide', 'crime against humanity', 'war crimes' and 'the crime of aggression', the ICC's normal jurisdiction regime is applicable for the international community as a whole.²¹

With a view to averting such situation a "special entry-into-force mechanism" was formulated in the Kampala conference through the inclusion of Article 15*bis*(5) which questionably excluded non-States Party totally from the jurisdiction of the crime of aggression. Such a remedy through Article 15*bis*(5) could be considered as a "softly" consent footed solution as to "Article 121(5) Model with a Negative Understanding" which is to be considered as "strictly" consent-based.²²

Article 15*bis*(5) states that –

"In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory."

18Klamberg M, "Rome Statute and the Rules of Procedure and Evidence – Article 121 Amendments", Case Matrix Network (CMN), June 30, 2016. Available at <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/rome-statute/#c1295>.

19Kress C and Holtendorff L V, "The Kampala compromise on the Crime of Aggression", 8 JICJ, 2010, 1179; Coracini A R, "The International Criminal Courts Exercise of Jurisdiction over the Crime of Aggression", 2 Goettingen JIL, 2010, 745.

20See *supra* note 17.

21Rome Statute of the International Criminal Court, Article 5, 1998. Available at <https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx#top>.

22See *supra* note 19.

However, such limitations towards non-States Party is vague in the sense that ASP possessed the legality to apply the new war crimes amendment for the non-States Party also since they are presently prohibited to apply some specific weapons on the State Party leading to serious crimes as per Rome Statute 1998.

The non-State Party cannot use “asphyxiating, poisonous or other gases” or cannot use “bullets which expand or flatten easily in the human body” or the application of “poisoned weapons” which is prohibited as per Article 8(2) of the Rome Statute²³but they are allowed to use biological weapons, non-detectable fragment producing weapons and laser weapons causing permanent blindness on the State Party who has even ratified the addition of new war crimes amendment. Thus, the new war crimes amendments have induced fragmentation of the jurisdiction of the ICC.

The new crimes of unique character were not under the purview of the ICC jurisdiction in the earlier occasion. The Rome Statute has not experienced any difficulty to bring non-States Party under the jurisdiction of the war crimes for using prohibited weapons where 124 States have ratified the Statute. Why then differential treatment at the time of addition of new war crimes? As per new war crimes amendment, we may consider hypothetically that Russia (a non-State Party) is allowed to use permanent blinding laser weapons on Tbilisi (Georgian capital) but is not allowed to use asphyxiating gas, napalm. In the Nuremberg Trial, the non-States Parties accused of aggression were brought under prosecution.²⁴In fact, setting aside the non-States Parties in the preambular section of the new war crimes amendments should not have any legal effect. In the amended Statute there is no mention of the exclusion of the non-States Parties, only the preamble mentions such limitations. Article 21(1)(a) of the Rome Statute clearly states that “[t]he Court shall apply ... [i]n the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence.” If this is so, the judges have every right to enforce any war crime (including new war crimes) as per Article 8 of the Statute committed by a non-State Party on the territory of a State Party.

Thus, the Office of the Prosecutor (OTP) has the independence to frame charge against any non-State Party who has committed new war crimes on the State Party who has affirmed the amendments and the perpetrators of the related war crimes could be pronounced guilty by the

²³Rome Statute of the International Criminal Court, Article 8(2), 1998. Available at <https://www.icc-cpi.int/resource/library/official-journal/rome-statute.aspx#top>.

²⁴United States v. Alfred Krupp, 9 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg 5 (1950).

judges. Paragraph 3 of the ASP Resolution²⁵ also reestablishes judicial independence of the Court.

VII. CUSTOMARY INTERNATIONAL LAW AND OBLIGATION, IF ANY, TO INCLUDE ONLY THE CRIMES UNDER CIL IN THE ICC STATUTE

There was a controversy over the inclusion of new war crimes on the ground of its exact character about customary international law status. Some proponents of the proposed amendments considered the crimes as a reflection of customary international law but few opponents disagreed and debated that as per Rome Statute ban of crimes under customary international law is a precondition for the incorporation of new war crimes.²⁶ Due to this lack of consensus among the delegations, the draft report submitted by the Working Group and subsequently adopted by the Assembly of States Parties nowhere referred 'customary international law'.²⁷

However, such differences in opinion were not observed in the Kampala Review Conference where a series of war crimes were included with regards to non-international armed conflicts. In that Review Conference it was considered that "the crimes . . . are serious violations of the laws and customs applicable in armed conflict not of an international character, as reflected in customary international law".²⁸

The customary international law is, however, under inclusive so far Rome Statute is concerned which is evident from the fact that the Statute did not incorporate the war crimes like deliberate assault on civilians in its Article 8 which had been considered to be customary under International Criminal Tribunal for the former Yugoslavia (ICTY) in the Tadic Appeal Case.²⁹

In fact, according to Article 21(1) of the Rome Statute customary international law has been considered as the secondary source of law only after written rules (Statute) contemplated as

25 Resolution ICC-ASP/16/Res.5, ¶ 3, available at <http://www.derechos.org/nizkor/aggression/doc/aggression129.html>.

26 FICJ - Forum for International Criminal Justice, Newsletter: February 2018, February 1, 2018. Available at <https://www.iap-association.org/getattachment/83728be5-1d29-420c-9940-e75b161f6bbe/February-2018-FICJ-Newsletter.aspx>.

27 ICC-ASP/16/24, "Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression", Assembly of the States Parties Sixteenth Session, New York, 4-14 December 2017, ¶ 12.

28 Kampala Review Conference, "Resolution RC/Res.5 Amendments to article 8 of the Rome Statute" 12th Plenary Meeting, June 10, 2010. Available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf.

29 Prosecutor v Tadić (Interlocutory Appeal Decision on Jurisdiction) ICTY-94-1-AR72 (2 October 1995).

the first source of applicable law. In the case of the Prosecutor v. Katanga and Ngudjolo³⁰ in the decision on confirmation of charges, the ICC Pre-Trial Chamber held that –

“since the Rome Statute expressly provides for this specific mode of liability [co-perpetration through another person – indirect cooperation], the question as to whether customary law admits or discards the ‘joint commission through another person’ is not relevant for this Court”

In the same vein, in the case of Prosecutor v. Ruto *et al.*³¹ the Pre-Trial Chamber argued that customary international law would have limited applicability since ‘indirect cooperation’ is included in the Article 25(3)(a) of the Rome Statute.³² Furthermore, as mentioned in the Article 22(1) of the Rome Statute “a crime within the jurisdiction of the Court” restricts the ICC to sue for crimes purely based on customary law not expounded in the Statute.³³ Thus, the customary international law has become less compelling for the ICC as per provisions of the Statute.

However, customary international law could still perform an important function as a secondary source to explain the ICC’s written Statute where there is a legal vacuum.³⁴ The Court *per se* has accentuated that the Statute has not specified the definition of the terms “international armed conflict” or “armed conflict not of an international character” but the customary international law could define such terms under broader perspective.³⁵ Such interpretational guidance of the customary international law has been taken by the Pre-Trial Chamber of the ICC in the ‘Confirmation of the Charges Decision’ of the Prosecutor v. Katanga and Ngudjolo case³⁶ regarding the interpretation of the attributes ‘systematic’ and ‘widespread’ for the crime against mankind. Moreover, in the ‘Second decision on the Defence’s challenge to the jurisdiction of the Court’ in the Ntaganda case³⁷ the Trial

30The Prosecutor v Katanga and Ngudjolo (Decision on the confirmation of charges, Pre-Trial Chamber I) ICC-01/04-01/07-717 (30 September 2008) (Katanga and Ngudjolo Confirmation of Charges Decision) paras 506–08.

31Prosecutor v Ruto *et al.* (Decision on the Confirmation of Charges Pursuant to Article 61 (7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II) ICC-01/09-01/11-373 (23 January 2012) para 289.

32Rome Statute of the International Criminal Court, Article 25(3)(a), 1998. Available at <https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx#top>.

33Rome Statute, Art 22(1) (*Nullum crimen sine lege*) reads: ‘[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court’. Schabas (n 33) 543; Bitti (n 33).

34Elements of Crimes, Introduction to art 8; The Prosecutor v Lubanga (Judgement on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to art 19 (2) (a) of the Statute of 3 October 2006, Appeals Chamber) ICC-01/04-01/06-772 (14 December 2006) para 34..

35Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, para. 83 (Mar. 21, 2016).

36THE PROSECUTOR v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, September 30, 2008, n 36, ¶412. Available at https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF.

37The Prosecutor v Ntaganda (Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9, Trial Chamber VI) ICC-01/04-02/06-1707 (10 January 2017) (Ntaganda Trial

Chamber referred to contemplate customary international law provisions to ascertain the status of the war victims of rape and sexual slavery in absence provisions in the Rome Statute. Consequently, customary international law is under inclusive and not over inclusive for the ICC jurisdiction.

The Rome Statute is flowing beyond the bounds of customary international law.³⁸ It is evident from the Article 8(2)(b)(iii) and Article 8(2)(e)(iii) where assault against peacekeepers could be considered war crimes so long “as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict”.³⁹ Such explanation reveals that this attack against peacekeepers is not a new crime but could be treated as a segment of the customary international crime of willful assault on civilians.

Nevertheless, the jurisdiction of the court should be to uphold a harmony within the legal regime of the international criminal law sidestepping fragmentation through interpretation of the Statute under the perspective of customary law. The rulings of the Court may successively reshape the present customary law into a newer one agreeable with the Statute. This would ultimately silent the arguments over the customary nature of the newly included war crimes besides problems of fragmentation.

VIII. PROBLEMS OF INCLUSION OF CRIMES NOT UNDER CIL IN THE ICC STATUTE

Problems may be encountered when the crimes not under customary international law are brought under the domain of ICC jurisdictions. Commonly, ICC may administer its jurisdiction even in the absence of ratification by the State i.e. non-States Parties on two occasions – (i) when under Article 13(b) of the ICC Statute, the UN Security Council (SC) refers a situation to the ICC encompassing non-states parties where usually the Court does not have any jurisdiction under Article 12 and (ii) when a situation arises out of ad-hoc declaration by a non-party state (or a state party not ratified the Statute) under Article 12(3) that it has confirmed the jurisdiction of the ICC for a particular crime.

Under both the circumstances i.e. Security Council referrals and ad-hoc declaration, there is a problem for retroactive or ex-post facto application of the ICC Statute. The Court usually enjoy the prospective jurisdiction rather than retrospective jurisdiction which originates out of such situations those have taken place before the Security Council referrals and declaration

Decision) paras 40–44, 46–47.

³⁸Schabas W, “An Introduction to the International Criminal Court”, 3rd Edition, Cambridge, CUP, 2007, 127.

³⁹Rome Statute of the International Criminal Court, Article 8(ii), 1998. Available at <https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx#top>

by the non-party state or state party not ratified the Statute.⁴⁰In fact, a person generally could be brought under the purview of the criminal law after the commission of the crime if he was put on notice by some earlier law provisions that his act was criminal in nature and blameworthy.⁴¹ In other words, if the crime was not under any customary international law during committing the crime, the person accused may legally defend himself that the application of treaty provision on him would contravene the doctrine of legality – ‘*nullum crimen sine lege*’ i.e. ‘no crime without law’. Article 22(1) of the Rome Statute incorporated this principle which states that “a person shall not be criminally responsible under this statute unless the conduct in question constitutes at the time it takes place, a crime within the jurisdiction of the Court”.⁴²Thus, if the substantive content of the Statute goes beyond the bounds of any former law sources, the accused person who has committed crime earlier could not have the chance to foresee surpassing of the statutory provisions.

There are three extant solutions for the present problems with their limitations.

- (i) *Compatibility check* – Under this solution, many authors propose that straightforward authentication of the coherence between the Statute and the customary international law or national law with regards to Security Council referrals or ad-hoc declarations.⁴³If there is a lack of consistency between the Statute and the CIL then as discussed earlier the substantive provisions of the Statute would be inapplicable⁴⁴ and vice versa.⁴⁵But such simple explanations have their flaws. The compatibility check solution does not guide how the Court should resolve the issue in a case where the Statute provisions go beyond the CIL and legal grounds for the Court on how to proceed for the comparison between the CIL and the Statute. Article 21(1)(a) gives primacy to the Statute and Articles 22(1), 23 and 24(1) reflect the Statute’s self-legality principle does not necessitate consistency requirement. In all, the compatibility check solution has its limitations.

40Rome Statute of the International Criminal Court, Articles 11(2), 12(3) & 13(b), 1998. Available at <https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx#top>.

41International Covenant on Civil and Political Rights (ICCPR), Article 15(1); European Convention of Human Rights (ECHR), Article 7(1), American Convention on Human Rights (ACHR), Article 9; Gallant K S, “The Principle of Legality in International and Comparative Criminal Law”, (Cambridge University Press, 2010), at 20, 352, 357–358, 364–365.

42Rome Statute of the International Criminal Court, Articles 22(2), 1998. Available at <https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx#top>.

43O’Keefe R, “International Criminal Law”, Oxford University Press, 2015, at 554; Gallant, “Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts”, 48 Villanova Law Review (2003) 763, at 828, 839; Broomhall B, “Article 22: Nullum Crimen Sine Lege”, in O. Triffterer and K. Ambos (eds), Rome Statute of the International Criminal Court: A Commentary (3rd edn., Beck/Hart, 2016) 949, at 956

44*Ibid*, O’Keefe at 553;

45*Ibid*, O’Keefe at 554;

- (ii) *Interpretative* – This solution although begins with the compatibility check but it provides Court guidelines if the Statute is broader than CIL. This solution in case of conflict calls for the Court to interpret the Statute according to the doctrine of non-retroactivity under general international law based on “internationally recognized human rights”.⁴⁶ Here the Court could go for jurisdictional interpretation, that is, where the Statute is beyond CIL or other law sources (the question of substantive retroactivity), the Court’s jurisdiction would be the guiding factor.⁴⁷ Here an individual could be charged and punished as per Statute subject to its conformity with the former applicable law. Thus, on the foundation of the criminalization of the conduct likely breach of non-retroactivity principle could be circumvented.⁴⁸
- (iii) *Displacement* – Such solution assesses the ‘genuine norm conflict’ between the non-retroactivity principle and the more comprehensive statutory provisions. ‘Genuine norm conflict’ could be ascertained through the application of norm displacement technique i.e. superiority of one rule over the other.⁴⁹ Pursuant to the displacement solution, the reply is embedded within Article 21(3) ICC Statute, a provision of this Article constitutes a super-legal position of the ‘internationally recognized human rights’, inclusive of the principle of non-retroactivity. As directed by Article 21(3), the Court shall not only define the law but also implement the law according to human rights which are internationally recognized.⁵⁰

Thus, if the retroactivity issue is addressed as a conflict of norms as in displacement solution and if the Court goes for jurisdictional interpretation based on the criminalization of conduct as in interpretative solution, the problems which originate out of SC referral and ad-hoc declaration with regards to non-retroactivity principle could be attenuated. Interpretation of the applicable law by the Court based on the ‘internationally recognized human rights’ including the principle of legality to implement the norm displacement technique as envisaged under Article 21(3) could be solution tool for the questions which has cropped up following the addition of three new war crimes in the Statute particularly in absence of any customary international law status of the new war crimes.

46 Milanovic M, “Is the Rome Statute Binding on Individuals? (And Why We Should Care)”, 9 JICJ (2011) 25 at 52.

47 *Ibid*, at 30-32, 48, 51-52.

48 *Ibid*, at 52.

49 Milanovic M, “A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law”, 14 Journal of Conflict & Security Law (2009) 459, at 465; Pauwelyn J, “Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law”, (Cambridge University Press, 2003), at 327.

50 Akande A, ‘Sources of International Criminal Law’, in A. Cassese et al. (eds), The Oxford Companion to International Criminal Justice (Oxford University Press, 2009) 41, at 47.

IX. CONCLUSION

The inclusion of new war crimes in the ICC Statute may lead to problems encountered basically on two counts – (i) fragmentation of the ICC Statute and (ii) bounds of the customary international law issue. Since there is no mention of the non-State Parties in the amended Statute save the preambular section and as paragraph 3 of the ASP Resolution ‘ICC-ASP/16/Res.5’ “[r]eaffirms paragraph 1 of article 40 and paragraph 1 of article 119 of the Rome Statute in relation to the judicial independence of the judges of the Court”,⁵¹ OTP has the independence to act against any non-State Party who has committed the new war crimes to solve the problem of fragmentation. In absence of CIL nature of the new war crimes, in case of Security Council referrals for the non-State Parties and the ad-hoc declaration by the non-State Parties related to the new war crimes on the retroactivity issue, jurisdictional interpretation of the Court based on criminalization of conduct and superiority of the ‘internationally recognized human rights’ as per Article 21(3) in the event of ‘Genuine norm conflict’ between the non-retroactive principle and the comprehensive statutory norms, Court has the every right to extend its jurisdiction beyond customary international law. Thus, the inclusion of new war crimes in the ICC Statute not only overlaps fragmentation regime but also marches towards the goal of criminalization of these new war crimes under customary international law.

⁵¹See *supra* note 25.